IN THE

SUPREME COURT OF THE UNITED STATES

November Term, 1973

No. _____

In The Matter Of: RAYMOND CHESTER MILLER,

Bankrupt,

MERRILL T. LANDWEHR, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Merrill T. Landwehr
Counsel for Petitioner
225 Baronne Street, Suite 2313
New Orleans, Louisiana 70112
Telephone: 1-504-529-1232

INDEX

	Page
Opinions below	4
Jurisdiction	5
Question presented	5
Statute involved	5
Statement	5
Reasons for granting the writ	13
Conclusion	31
Appendix A - Statutes	33
B - Opinions and judgment below	34

CITATIONS

Cases:

In Re Aero Bulk Manufacturing Company 221 F. Supp. (1963)..... 19

Avidon v. Halpert, 145 F. 2d 884 (1944)..... 21

Bank of Marin v. England, 385 U.S. 99 (1966) 26, 27, 29

Burton Coal Company v. Franklin Coal Company, 67 F. 2d 796 (1933)..... 29

In Re Chemo Puro Manufacturing Corp., 202 F. Supp. 140 (1962)..... 28

In Re Ebeling, 123 F. 2d 520 (1941)..... 15

First National Bank of Fort Worth v. Virginia Oil and Refining Company, 86 F. 2d 770 (1936) 30

In Re Harmack Produce Co., Inc., 44 F. Supp. 1 (1942).....15, 22, 29

In Re. 74 Knowles Street Corporation, 52 F. Supp. 715 (1943)..... 18

In Re. Kornblum, 22 F. Supp. 245 (1938)..... 29

L. O. Koven & Brother, Inc. v. Local Union No. 5767 United Steelworkers of America, 250 F. Supp. 810 (1966)..... 20, 31

In Re Lewis J. Glayer, 95 F. Supp. 472 (1951).. 18

In Re Martin Edsel, Inc., 228 F. Supp. 538 (1968)..... 21, 22, 23, 25, 26, 29

Mellen Manufacturing Co., 287 F. 2d 37 (1961).. 13

Milando v. Perrone, 157 F. Supp. 1002 (1946)... 25

In Re Miracle Mart, Inc., 396 F. 2d 62 (1968).. 21

Pepper v. Litton, 308 U.S. 295 (1939) 21, 22, 25, 27

Pusey and Jones Corporation, 192 F. Supp. 233 (1961)..... 28

Phillips v. Tarrier Company of Delaware, 93 F. 2d 674 (1938)..... 31

In Re Quine, 30 F. Supp. 871 (1941)..... 17

In Re R. B. Rose Co. 43 F. 2d 446 (1930)..... 17

In Re Romanac, 245 F. Supp. 882 (1965)..... 28

Securities Exchange Commission v. U. S. Realty and Imp. Company, 310 U.S. 434 (1940)..... 27

Tarbell v. Crex Carpet Co., 90 F. 2d 683 (1937) 17

In Re Vandergift, 232 F. Supp. 857 (1964)..... 20

In the Matter of Vega Baja Lumber Yard, Inc., 285 F. Supp. 143 (1968)..... 20

In Re W. H. Calder Company, 146 F. Supp. 389 (1956)..... 19

Wheeling Valley Coal Corporation v. Mead, 171 F. 2d 916 (1949)..... 14

Williams v. Rice 30 F. 2d 814 (1929)..... 31

IN THE

SUPREME COURT OF THE UNITED STATES

November Term, 1973

No. _____

In The Matter Of: RAYMOND CHESTER MILLER,

Bankrupt,

MERRILL T. LANDWEHR, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on September 17, 1973.

OPINIONS BELOW

The opinion of the referee in bankruptcy is unreported and is printed in Appendix B attached hereto, infra, p. . The opinion of the District Court is unreported and is printed in Appendix B attached hereto, infra, p. . The opinion of the

Circuit Court of Appeals is unreported and is printed in Appendix B attached hereto, infra, p. .

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on September 17, 1973, p. infra. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

May the IRS file an initial proof of claim in a bankruptcy proceeding when the time for filing said claim provided for under 11 U.S.C.A. § 93 sub n has expired and the IRS has not, pursuant to the requirement of said provision, applied for an extension of the filing date.

STATUTE INVOLVED

The statutory provision involved is 11 U.S.C. § 93 sub n.

STATEMENT

The facts which give rise to this controversy are not in dispute. The Bankrupt, Raymond C. Miller, a/k/a Raymond Chester Miller, filed a voluntary petition in Bankruptcy in the United States District Court for the Southern District of Florida, Miami Division, on January 31, 1968. Schedule A-1 of the Bankrupt's petition did not list the United States as a creditor of the Bankrupt estate.

On March 19, 1968, notice was mailed to all creditors of the Bankrupt informing them of the fact that the first meeting of creditors was to be held in Miami, Florida, on April 4, 1968, and further informing said creditors that the last day for filing proofs of claim against the Bankrupt estate would be October 4, 1968. Copies of said notice were mailed to all appropriate governmental agencies, including the Internal Revenue Service, as was evidenced by the "Certificate of Notice" of said Court dated March 19, 1968.

Pursuant to the aforementioned notice, the first meeting of creditors was duly and properly convened and held in Miami, Florida, on April 4 and 5, 1968, at which meeting it was determined by United States Referee in Bankruptcy, James E. Yacos of the Southern District of Florida, Miami Division, that this proceeding should be transferred to the United States District Court for the Eastern District of Louisiana, New Orleans Division, pursuant to Section 32 of the Bankruptcy Act (11 USC 55), for the convenience of all parties at interest. The Honorable Emett Choate, District Judge, accepted Referee Yacos'

determination and on May 6, 1968, rendered an appropriate order transferring this proceeding from the Southern District of Florida to the Eastern District of Louisiana.

After said transfer had been completed, the Clerk of the Bankruptcy Court in New Orleans, on July 18, 1968, mailed notices to all creditors of the Bankrupt and to all appropriate governmental agencies, including the Internal Revenue Service, informing said recipients of the fact that a meeting of the creditors was to be held in New Orleans on August 6, 1968. Said notice indicated that this proceeding in Bankruptcy was the same proceeding as was transferred to the Eastern District of Louisiana from the Southern District of Florida. However, through inadvertent error, said notice to creditors was sent in the form of a notice of the first meeting of creditors and failed to inform the recipients thereof that the August 6th New Orleans meeting was to be a continuation of the previously convened April 4th meeting of the creditors in Miami. Through further inadvertent error, said notice incorrectly stated that the last day for filing proofs of claim against the Bankrupt estate would be February 6,

1969, rather than repeating the originally established October 4, 1968 bar date, as had been set by Referee Yacos in Miami.

Three proofs of claim were filed against the Bankrupt estate with the United States District Court for the Southern District of Florida in Miami, and four additional proofs of claim were filed with the United States District Court for the Eastern District of Louisiana in New Orleans on or before October 4, 1968 bar date. These alleged claims totaled $206,946.47.

On January 27, 1969, or approximately four months after the expiration of the October 4, 1968 bar date, the Internal Revenue Service filed a proof of claim in this proceeding on behalf of the United States in the amount of $208,850.70, which sum allegedly represented the Bankrupt's Federal income tax liability for years 1966 and 1967. On July 24, 1969, the Internal Revenue Service filed an amended proof of claim in this proceeding asserting a tax liability on the part of the Bankrupt in the amount of $90,664.82 for 1967 taxes alone. On July 6, 1970, said amended proof of claim was again amended to reflect a tax liability of $90,492.98 solely for 1967 taxes.

On August 27, 1970, Merrill T. Landwehr, the duly qualified and appointed Trustee in this proceeding in Bankruptcy filed a "Petition for an Order to Show Cause Why Claims Should Not Be Expunged or Otherwise Reduced" asserting that the proof of claim submitted on behalf of the United States through the Internal Revenue Service was not timely filed of record in this proceeding; and, in the alternative, asserting that said proof of claim, if timely filed, was not sufficient to establish a prima facie case for the allowance of the Government's tax claim with priority.

The United States, in opposing the Trustee's position, took the position that its tax claim was timely filed in this proceeding before the purported February 6, 1969 bar date as disclosed in the Bankruptcy Court's notice of July 18, 1968. In the alternative, the United States asserted that should original October 4, 1968 bar date control, the Government was entitled to the equitable relief as provided for under the proviso of Section 57(n) of the Bankruptcy Act (11 USC 93n), under which the Government is granted the right to seek an extension of the time period

within which it may file a tax claim in a proceeding in Bankruptcy. The United States further asserted in the alternative, that its actions prior to the expiration of said October 4, 1968 bar date constituted the filing of an informal proof of claim in this proceeding, and that, accordingly, the filing of its formal tax claim after the effective bar date should be considered as an amendment to that informal claim.

The matter was submitted for determination before United States Referee in Bankruptcy P. M. Flanagan of the Eastern District of Louisiana, who, in his "Findings of Fact and Conclusions of Law and Order" rendered on June 21, 1971, held that the original bar date of October 4, 1968, as established by Referee Yacos in Miami, was controlling over the inadvertently disclosed February 6, 1969 bar date. In so holding, Referee Flanagan dismissed the tax claim of the United States as untimely, further holding that the Government was not entitled to the equitable relief prayed for and that the Government's actions prior to October 4, 1968, did not amount to nor constitute the filing of an informal proof of claim in this proceeding. Referee Flanagan did

not address himself to the issue of whether the Government's proof of claim was sufficient to establish a prima facie case for allowance, as that particular question was moot in light of his disallowance of said claim.

In response to said order, the United States filed a "Petition for Review" before the United States District Court for the Eastern District of Louisiana, Section "A", seeking to have said order reversed. The Honorable Herbert W. Christenberry, District Judge, addressing the issues presented, held that the Referee was in error in finding the October 4, 1968 bar date to be controlling. Judge Christenberry, in effect, held that the Florida referee's order was nugatory and that Referee P. M. Flanagan purposefully set a new bar date at February 6, 1969. The District Court further allowed the Government's tax claim against the Bankrupt estate, and held that said proof of claim constituted sufficient prima facie evidence of indebtedness.

On October 28, 1972, Trustee in Bankruptcy filed a "Notice of Appeal" of the District Judge's ruling in this proceeding before the Honorable

5th Circuit Court of Appeal pursuant to Section 4(a) of the Federal Rules of Appellate Procedure (28 USC). On September 17, 1973, the Honorable 5th Circuit rendered its decision in the matter and found as follows.

The Honorable Court of Appeals overruled the District Court's finding that referee Yacos' order was nugatory, holding instead that "orders issued prior the transfer continued as though the case were still pending in the original district". With this finding, Appellant is in agreement. The Honorable 5th Circuit also recognized that the appearance of a new bar date in the notices mailed from Referee Flanagan's Court were due to a clerical error and further found that the IRS did not apply to either Bankruptcy Court for an extension of time within which to file their claim prior to the expiration of the six (6) month period provided by 11 USC n.93 sub n. Appellant is also in agreement with these findings.

However, the Honorable Court of Appeals found that since the Bankruptcy Court had the power to grant an extension to the IRS, had the IRS filed

for said extension within the 6 month period of limitations and had shown cause for the granting thereof, the IRS believed that such an extension had been granted when it received the notice from Referee Flanagan's Court and was thereby misled to the time limit for filing its claim. The Court determined that on the basis of the preceding facts and the cases of In re Miracle Mart, Inc., 396 F.2d 62, 64 (2d Cir. 1968); In re Martin Edsel, Inc., 228 F. Supp. 538, 540-541 (D.C.N.H. 1968); and Pepper v. Litton, 308 U.S. 295, 305 n.11 (1939), it would be "unfair" to bar the claim of the IRS and therefor allowed it to be filed. It is with this result that Appellant disagrees.

REASONS FOR GRANTING THE WRIT

The decision of the Court below in the instant case is in direct conflict with several other circuits and presents a question of great importance in the administration of the federal bankruptcy laws.

In Mellen Manufacturing Co., 287, F.2d 37, 38 (1961), cert denied 366 U.S. 962, the Honorable Court of Appeals for the Third Circuit, in addressing itself to 11 USCA 93 sub n. and the question of whether claims could be initially filed after

expiration of the 6 month period provided therein, stated:

> "We do not regard the question as an open one in this Circuit. In the case of In re Supernit, Inc., 3 Cir., 1950, 186 F.2d 130, the question of timeliness in filing proofs of claim was discussed by the Court through an opinion by Chief Judge Biggs. It was pointed out that the rule in this Circuit even prior to the 1938 amendments has been stricter than that in other circuits. It was also stated that the statute of limitations was the result of abuses which "Congress has continuously sought to avoid * * *" 186 F.2d 132. It is pointed out that "Expeditious administration was a prime objective of the 1938 amendments" (186 F.2d 132) and that this Court found indications that the Congressional intent was that the periods of limitation set up were to be strictly enforced. "Modern administration requires a definitive cut-off date past which claims may not be filed," said the Court. 186 F.2d 133. It is true that this decision had to do with a filing of claims in a reorganization proceeding but everything said is applicable here also. See, likewise, In re Super Electric Products Corp., 3 Cir., 1953, 200 F.2d 790. Unless we are to overrule thoughtfully considered precedents in this Circuit the decision must stand. We have no inclination to overrule what we have thus thoughtfully considered."

In Wheeling Valley Coal Corporation v. Mead, 171 F.2d 916, 920 (1949) the Honorable Court of Appeals for the Fourth Circuit adopted the following position:

> "The courts have manifested a positive tendency to strictly enforce the limitation provision of the Bankruptcy Act, 11 U.S.C.A. § 93, sub. n, even to the point of holding that the statutory period is mandatory and that the courts have no power either to permit a late filing of claims or to extend the time set out in the statute."

The Seventh Circuit Court of Appeals in, In Re Ebeling, 123 F 2d 520, 521 (1941) made the following statement regarding the 6 month limitation:

> "To be sure, the statute does provide that claims shall not be proved against a bankrupt estate subsequent to six months after the adjudication, Bankruptcy Act, as amended § 57, sub. n, 11 U.S.C.A. § 93, sub. n, and gives the court no discretionary power to extend the time..."

The United States District Court for the Southern District of New York in In Re Harmack Produce Co., Inc., 44 F.Supp. 1, 2 and 4 (1942) offered the following analysis of the background of 11 U.S.C.A. § 93 sub. n as well as certain appropriate comments and conclusions to be drawn therefrom:

> "Despite the apparently explicit language of the 1898 and 1926 statutes the courts have from time to time debated whether they had the power to receive and allow tardy claims; and some courts resolved the debate in favor of such power...The majority of the decisions held that the statutes were an absolute bar to a tardy claimant. See list of authorities collated in 3 Collier on Bankruptcy, 14th Edition, page 320, note 6."
>
> "The Court of Appeals for the Second Circuit took its position with the majority..."
>
> "...Assuming that a bankruptcy court does possess equity powers which may be exercised in appropriate circumstances, I do not think that such power should be exercised when Congress has by express legislation given special recognition to the problem of claims by governmental bodies and has delimited by precise language the extent to which they

may be favored. Expecially is this true when the legislation exhibits a manifest awareness of the conflicting decisions and a determination to resolve the conflict. Specifically, the present statute makes the time limitation expressly applicable to the claims of the United States, of any State and of any subdivision thereof;...it confers a favorable exception upon governmental claims by permitting the court to grant an application, made within the specified time limit, for a "reasonable fixed extension"; it permits all tardy claimants to prove against a surplus...To read this statute as if it contained an additional exception, to wit, that at any time the court may permit the filing and allowance of a tardy claim by a municipality, is to convict Congress of a self-contradiction which the careful wording of the law does not warrant. The intention of Congress...is quoted in 3 Collier on Bankruptcy, 14th Edition, 116, footnote 35, as follows:

> "In the Senate Report No. 1916 on H.R. 8046, 75th Cong. 3rd Sess. (1938) 5, it was said: "The House bill includes within the bar time for the proving of claims, all claims of the United States and of any State or subdivision thereof. The committee has both strengthened and extended this proposed amendment by providing, first, that such claims must actually be filed within the bar time, and, second, by permitting additional time for the filing of such claims upon application for cause shown. The committee agrees with the proposal that governmental claims should be subjected to the same requirements as other claims but is of the opinion that the limitation should be tempered by the provision for extension for the reason that it is sometimes difficult for the Government to prepare and present its claims within a fixed time. The limitation will speed up the closing of estates, and the extension will provide a reasonable flexibility."

Typical of the strictness with which the 6 month limitation was applied prior to the 1938 amendment are the cases of Tarbell v. Crex Carpet Co., 90 F.2d 683, 684 (C.A. 8th Cir. 1937):

> "This provision is a statute of limitations and is mandatory... The fact that the claim was sent to a firm of attorneys who neglected to file it and who informed the claimant that it had been filed, does not empower the court to order the claim filed and allowed after the expiration of the statutory period..."

and In Re R. B. Rose Co. 43 F.2d 446, 447 (U.S. District Court S.D. N.Y. 1930):

> "...This section is in the nature of a statute of limitation, and unless the claim be proved within the said six months or the claim is within the exceptions, namely, is in process of litigation, or relates to an infant or insane persons, it is too late and the court is without power to extend the time."

Similar positions have been adopted in Federal District Courts throughout the United States since 1938: In Re Quine , 30 F. Supp. 871, 872 (1941) (U. S. District Court, E.D. Louisiana 1941)

> "... The statute specifying the time for filing claims in bankruptcy is prohibitive, and gives the Court no discretionary power to extend the time..."

> "Even though a creditor had no notice or knowledge of the proceedings during the time allowed by law for the proving of claims, and the estate is still undistributed, he may not prove his debt after the lapse of such period..."

In Re 74 Knowles Street Corporation, 52 F. Supp. 715, 716, 717 (U. S. District Court, E.D., NY 1943):

> "Prior to the Amendment of 1938 there were some decisions to the effect that the court was vested with equitable powers to extend the time and there were other decisions to the contrary. The six months provision is in the nature of a statute of limitations. The court is bound by the statute limiting the time to six months; it cannot enlarge the time. This has been the uniform holding in this district."

In Re Lewis J. Glayer, 95 F. Supp. 472, 473 (U. S.

> "The Chandler Act of 1938, § 57, sub. n, recast subdivision n to include claims of the United States and also provided that the court could grant further fixed time to the United States upon application prior to the six months' period. Prior to 1938 it was held that the time limit was not binding on the sovereign and it is evident that Congress included the provision with respect to government claims in order to avoid this latter interpretation and the provision for an extension of time was added in order to provide reasonable flexibility while at the same time maintaining the bar time. It is apparent that Congress in the 1938 Act was considering specifically government claims and there is little justification for assuming that a bankruptcy court has any power to alter or circumvent the express provision of the section as rewritten by reading into it further exceptions in the light of the special attention "to government claims" by Congress. Whatever rights existed before this revision were withdrawn by Congress in this specific legislation."

"The view expressed here is the same as that which is so well stated by the court in the case of In Re Harmack Produce Co. Inc., D.C., 44 F.Supp. 1, at page 2, where the legislative history of § 57, sub. n is set forth. It is plain from the latter that governmental claims should be subjected to the same requirements as other claims with an added provision for an extension of time for the proof of government claims to obviate the difficulty of the government in preparing and presenting its claims. Cf. 3 Collier on Bankruptcy, 14th Ed., p. 322."

In Re W. H. Calder Company, 146 F. Supp. 389, 391 (U. S. District Court E.D. North Carolina 1956).

"It appears from the decisions that 'with few exceptions the time requirement for the filing of claims is regarded as more than a mere limitation. It is held to be a prohibition upon the right to file after the expiration of the period. The result is that failure to file within the period defeats the right to file, although the failure was attended with such circumstances as would prevent the running of an ordinary statute of limitations, or would ordinarily constitute an excuse for noncompliance with the time limitations'." 6 Am. Jr., Bankruptcy, Section 458.

In Re Aero Bulk Manufacturing Company, 221 F. Supp. 627, 633 (U. S. District Court W.D. Missouri 1963).

"If the statute is a statute of limitations, then the equity jurisdiction of the court may not disregard its limitations and allow the filing of a claim specifically prohibited by the statute. The text books on the subject seem to be uniform in holding that it is a statute of limitations."

In Re Vandergift, 232 F. Supp. 857 (U.S. District Court W.D. Pennsylvania 1964), affirmed 341 F. 921.

> "In 1938, under Section 57 of the Bankruptcy Act, a creditor had six months from the date of the adjudication in which to file a claim. The time limit is now fixed at six months from the date of the first meeting of creditors. Several decisions in this circuit have laid down the rule that the time in which to file a claim is not to be extended except as provided in the statute. ...On the merits of the controversy, this Court's sympathy lies with Mrs. Vandergift. However, no escape is provided her in the statute."

L. O. Koven & Brother, Inc. v. Local Union No. 5767 United Steelworkers of America, 250 F. Supp. 810, 816 (District Court N.Y. 1966).

> "The time limitation of 11 U.S.C.A. Sec. 96(n) must be strictly observed and under no circumstances...may the court admit a claim to untimely proof, but...is under a duty to disallow it, with no power to substitute equitable considerations for the manifest intent of Congress."

In the matter of Vega Baja Lumber Yard, Inc., 285 F. Supp. 143, 144 (U.S. District Court D. Puerto Rico, 1968).

> "I am well aware that the weight of authority considers the six month period of Section 57(n) of the Bankruptcy Act 11 U.S.C.A. Sec. 93(n) as peremptory and immutable. ...The cases are decidedly in favor of an 'equity-proof' application of the statutory period."
>
> "Thus it has been firmly established that the court has no discretion to accept untimely filing of a claim."

Offered by the Fifth Circuit as justification for their decision are three cases: In re Miracle Mart, Inc., 396 F. 2d 62, 64 (2d Cir. 1968); In re Martin Edsel, Inc., 228 F. Supp. 538, 450-541 (U.S. District Court New Hampshire 1968); and Pepper v. Litton, 308 U.S. 295, 305 n.11 (1939).

The first of these, In Re Miracle Mart, Inc., 396 F. 2d 62, 64 (2d Cir. 1968), does not in any way support the decision of the Fifth Circuit in the instant case. In the Miracle Mart case, the court was dealing with Section 355 of the Bankruptcy Act and more specifically the provisions appearing thereunder, prior to the 1967 amendments, dealing with rejection of executory contracts. The court found itself confronted with an irreconcible statutory conflict:

> "...we have a series of inconsistent sections which create a fundamental ambiguity. We are required therefore to construe the Bankruptcy Act as best we can. We believe that in such circumstances resort to the equity powers of a bankruptcy court to fashion a remedy for this aberrant situation is justified." 396 F. 2d 62,64.

In rendering said decision the court distinguished the situation before it from that of 11 U.S.C.A. 93(n) where no ambiguity exists. Indeed, in distinguishing "cases holding that the Bankruptcy Court cannot extend the time for filing claims" (all of said cases dealing with 11 U.S.C.A. Sec. 93(n)), the court stated:

> "More important, in none of them was the court faced, as we are here, with inconsistent portions of the same statutory scheme dealing with executory contracts". 396 F. 2d 62, 65

One of the cases so distinguished, Avidon v. Halpert, 145 F. 2d 884 (1944), arose in the Second Circuit, and the decision therein adds the Second Circuit to the list of Courts of Appeal which are in conflict with the 5th Circuit's judgment in the instant suit. In Avidon, the Second Circuit, in making reference to

the six month limitation of 11 U.S.C.A. Sec. 93(n), stated:

> "As we read the cases, there must be a timely assertion however informal by the creditor of his claim against the debtor estate." 145 F. 2d 884, 885.

The second case offered by the Fifth Circuit is Pepper v. Litton, 308 U.S. 295, (1939) and more specifically footnote 11 appearing therein at page 305. If this citation were acceptable authority for the Fifth Circuit's position, the question of conflict between Circuits would seem to be moot. However, the Pepper case is not such authority.

As pointed out in In Re Martin Edsel, Inc., 228 F. Supp. 538 (United States District Court New Hampshire 1968):

> "The footnote in Pepper v. Litton has, in turn, been subjected to criticism, 1 Collier on Bankruptcy, par. 2.09 n. 9, and has been variously characterized as dictum, Arnold v. Phillips, 117 F. 2d 497, 502 (5th Cir. 1941), as applying to the Bankruptcy Act prior to the 1938 amendments, In re Paragon Novelty Bag Co., supra; as misleading, 3 Collier on Bankruptcy, par. 57.27 n. 14; and as unnecessary and dubious commentary on the state of the law, Milando v. Perrone, 157 F. 2d 1002, 1004 (2nd Cir. 1946)."

The most devastating of these well founded criticisms, insofar as the Fifth Circuit's citation of the case as authority is concerned, is the characterization of the comment as dictum. In In re Harmack Product Company, Inc., 44 F. Supp. 1, 2 (U. S. District Court, S.D. New York, 1942) the court made reference to said footnote as follows:

> "The language is used, it should be noted, not to express the court's decision on the matter pending before it but to illustrate the generalization that the Bankruptcy Courts have exercised these equitable powers in passing on a wide range of problems arising out of the administration of bankrupt estates."

As dictum, the stature which the footnote retains as authority for future decisions was well stated in Milando v. Perrone, 157 F. Supp. 1002, 1004 (2nd Cir. 1946):

> "The statement of the Supreme Court is a dictum which should not be taken as placing a final stamp of approval on propositions not necessary to the court's decision."

Therefore, it would appear that the Pepper case in no way mollifies or resolves the presently existing conflicts between the decision in the instant suit and those of the previously listed circuits.

The third and last case cited by the Fifth Circuit was In Re Martin Edsel, Inc., 228 F. Supp. 538, 540, 541 (U.S. District Court New Hampshire, 1933). In this case the court made the following observation:

> "The provisions of Section 93, sub. n. are not to be disregarded lightly.... The six months' period of limitation is not the product of Congressional whimsy, but reflects careful consideration of the economic and financial realities of bankruptcy.... Apart from the specific exceptions enumerated in Section 93, sub. n., the six months' bar is mandatory and can be lifted neither in the discretion of the court nor upon the general consideration that some inequitable result would follow."

The court eventually determined that said statutory bar could be lifted:

> "...only in the extraordinary case where some element of fraud or injustice has prevented a creditor from filing his claim in timely fashion...."

The court ruled that no such situation existed in the suit before them.

It can be readily ascertained, after a review of the foregoing, that the Fifth Circuit rested its decision, for all practical purposes, on but one District Court decision, In Re Martin Edsel, Inc., supra, and thereby reached a conclusion in direct conflict with at least four Circuits.

However, not only is the present decision in direct conflict with four other Circuit Courts, it is in direct conflict with the principle announced in the Martin Edsel case upon which the Fifth Circuit relies in rendering its judgment.

In prefacing its "equity" decision, the Fifth Circuit stated that the general equity power of Bankruptcy Courts is well established and cited as authority Bank of Marin v. England, 385 U. S. 99 (1966).

In the Marin case this Honorable Court considered the question of whether a bank which honored checks of a depositor drawn before its bankruptcy but presented after it had filed a voluntary petition in bankruptcy is liable to the Trustee for amounts paid where the bank had no knowledge or notice of the proceeding.

This Honorable Court found that:

> "Absent revocation by the drawer or his trustee or absent knowledge or notice of the bankruptcy by the bank, the contract between the bank and the drawer remains unaffected by the bankruptcy and the right and duty to pay duly presented checks remains as before. In such circumstances, the Trustee acquires no rights in the checking account greater than the bankrupt itself."

Counsel had argued that the payment by the bank was a prohibited transfer within the meaning of Section 70d(5) and 18 (f) of the Bankruptcy Act. This Honorable Court responded as follows:

> "Yet we do not read these statutory words with the ease of a computer. There is an overriding consideration that equity principles govern the exercise of bankruptcy jurisdiction....

"The force of Section 70d(5) and 18f can be maintained by imposing liability on the payee of the checks if he has received a voidable preference or other voidable transfer. The payee is a creditor of the bankrupt and to make him reimburse the trustee is only to deprive him of preferential treatment and to restore him to the category of a general creditor. To permit the trustee under these circumstances to obtain recovery only against the party that benefits from the transaction is to do equity."

The two cases cited by this Honorable Court as proof that equity principles govern the exercise of bankruptcy jurisdiction were Securities Exchange Commission v. U. S. Realty and Imp. Company, 310 U.S. 434 (1940) and the Pepper case, supra. In the Securities & Exchange Company case this Honorable Court held:

"A bankruptcy court is a court of equity...and is guided by equity doctrines and principles except insofar as they are inconsistent with the Act". 310 U.S. 434, 455.

In the Pepper case, supra, this Honorable Court found that:

"...A bankruptcy court is a court of equity at least in the sense that in the exercise of its jurisdiction conferred upon it by the Act, it applies the principles and rules of equity jurisprudence." 308 U.S. 238, 244.

The principle announced by these three preceding cases is quite clear. Once it is established that a bankruptcy court has authority to do something, it may accomplish said result on the basis of equity principles as long as said principles do not contravene the provisions of the Bankruptcy Act, i.e., in the Bank of Marin case, supra, this Honorable Court concluded that under the circumstances the transfer of funds by way of cashing of a check was a violation of provisions to the Bankruptcy Act. However, as the Act was not clear as to the particular method of accomplishing its command under the existent circumstances, this Honorable Court resorted to general equity principles

to resolve the matter. Based on the finding that the trustee had no greater rights than the bankrupt under the bankrupt's contract with the bank, and that said contract had not been effectively cancelled, and upon further finding that the payee of the check had received preferential treatment to which he was not entitled, this Honorable Court determined that the payee be held liable to the Trustee. It was only after this Honorable Court had determined (i) that the Bankruptcy Court had authority under the Bankruptcy Act to void the transfer and (ii) that the Act was not explicit, under the facts before the Court, as to the methods to be used to accomplish said purpose, did this Honorable Court decide that general equity powers could be exercised without conflicting with the Act itself.

The purported procedure for applying equity principles in situations involving 11 U.S.C.A. Sec. 93(n) is quite different. It is uniformly recognized by bankruptcy courts that the application of equity principles may not conflict with express statutory provisions of the Bankruptcy Act.

> "The general equity power of federal courts is clearly superseded by and must be confined within the Bankruptcy Act and related statutes." In Re Chemo Puro Manufacturing Corp. (U.S. District Court S.D. New York, 1962), affirmed 309 F. 2d 65. See also, In Re Pusey and Jones Corporation, 192 F. Supp. 233, 236 (U.S. District Court D. Delaware, 1961) (Affirmed) 295 F. 2d 479 (1961); In Re Romanac, 245 F. Supp. 882, 886 (U.S. District Court W.D. Virginia 1965), affirmed 386 F. 2d 225.

As previously pointed out, the vast majority of courts, have, based on this principle, found that the provisions of 11 U.S.C.A. Section 93 (n) are clear, specific and immutable and that the application thereof is "equity-proof"—especially where, as under Section 93(n):

"...Congress has by express legislation given special recognition to the problem of claims by government bodies and has delimited by precise language the extent to which they may be favored." In re Harmack Produce Co., 44 F. Supp. 1, 2 (U. S. District Court S.D. New York, 1942).

However, the Martin Edsel case has seen fit to pierce this "equity-proof" application:

"...Only in the extraordinary case where some element of fraud and injustice has prevented a creditor from filing his claim in timely fashion." 228 F. Supp. 538, 540.

This does not mean that an application of general equity powers without restraint is authorized under this principle, the explicit nature of 11 U.S.C.A. 93(n) leaving no room for such application. Rather, the court is merely stating that where there is the extraordinary situation of fraud or injustice the explicit provisions of 11 U.S.C.A. Section 93(n) will be ignored and a late filing allowed. Thus we have not the traditional application of broad equity powers within the framework of the Bankruptcy Act in order to fill gaps or voids therein (i.e. the Bank of Marin case), rather we have a calculated failure to observe the clear mandate of the law in two extreme situations.

An attempt at drawing this distinction was made in Burton Coal Company v. Franklin Coal Company, 67 F. 2d 796, 797 (8th Cir., 1933) wherein the Court stated:

"The plain mandate of the law cannot be set aside because of considerations which may appeal to referee or judge as falling within general principles of equity jurisprudence...

"It thus appears that the great weight of authority and reason is to the effect that, absent exceptional cases of the nature of those to which reference has been made (fraud and injustice) claims not proved within six months after adjudication cannot be proved against and paid out of a bankrupt estate." (Parenthetical statement added) 67 F. Supp. 796, 797, 801. See also In re Kornblum,

22 F. Supp. 245, 247 (U.S. District Court D. Minnesota 1938): "Section 93(n) eliminates any common-law equity power of the court to extend the time."

That the Courts are well aware of the exteme measures they take in overriding the clear and comprehensive provisions of the Act are manifest by the emphasis on the requirement that the occasion of such action be an extraordinary situation, i.e., fraud and injustice. The Fifth Circuit, in a much earlier case, set forth said emphasis in addition to the proposition that the application of equity in such situations is not one of general equity application within the framework of the Act but rather disregard of its plain provisions:

> "Though it has been decided that the section may not be invoked by the bankrupt where to permit him to do so will be to permit him to take advantage of acts of fraud or concealment...such exceptional circumstances must be made plainly to appear before its imperative provisions may be disregarded." First National Bank of Fort Worth v. Virginia Oil and Refining Company, 86 F. 2d 770, 771 (5th Cir., 1936). Writ denied, 300 U.S. 676.

It is clear from a reading of the judgment in the instant suit that the Fifth Circuit seized upon the Bank of Marin case and the relatively unrestrained equity application announced therein and transposed said theory into its cited cases dealing with 11 U.S.C.A. Section 93(n) in order to avoid what it termed an "unfair" result, i.e., the court stated that this equity power (referring to the equity power announced in the Bank of Marin case, to supplement the Bankruptcy Act) has been employed to prevent an unfair result occasioned by the six month limitation period of Section 93(n). The court thereby disregarded said provisions not on a finding of fraud or injustice but rather on the premise that bankruptcy courts may, without restraint, apply equity rather than the Bankruptcy Act in any situation where the court believes the result called for under explicit peremptory provisions of the Act is unfair. The result created thereby is a broader power than that

existing where the Act is without provision. The Fifth Circuit has taken a theory of broad application of equity used to achieve a judicial sense of fairness in situations where the Act is silent or vague and by applying it to six month limitation cases where there are explicit mandatory provisions, has created a theory of unrestrained invasion of equity not in aid of the Bankruptcy Act but in contravention of it, i.e., under the 5th Circuit's decision, the court may decide cases according to its sense of equity (not limited to situations of fraud or injustice) not only where the Act is silent or vague, but where the result occasioned by the application of mandatory provisions of the Act offends the court's sense of fairness. Such is not the law under any case in the United States including those cited by the Fifth Circuit in the instant suit. In fact, in the Martin Edsel case, supra, the court expressly found that the six months' bar can be lifted "...neither in the discretion of the court nor upon the general consideration that some inequitable result would follow" but "...only in the extraordinary case where some element of fraud or injustice...has prevented filing...in timely fashion." (emphasis added) 228 F. Supp. 538.

That the premise of the Fifth Circuit is in direct conflict with the cases it cited as support for its decision can be further illustrated by the fact that the situation before the court in the instant suit did not indicate the extraordinary conditions of fraud or injustice (which, incidentally the court never mentioned as existing) because said situation did not even indicate "unfairness" to the IRS.

The Court found that the IRS made no application for an extension but that the IRS was well aware that such an extension could be granted by the court. If it can be presumed that the IRS was aware of such authority, and appellant believes that it can, it must also logically be assumed that the IRS was equally aware of the conditions precedent to the exercise of said authority (although the Fifth Circuit would chose to circumscribe the IRS's appreciation of the authority so as to exclude knowledge of the said conditions and the absurdity which said knowledge would impute to the IRS's position). These conditions are as follows: (1) it must have been applied for by the IRS, (a blanket extension for all governmental

bodies and claims, state and federal, not being allowed under the Act), (2) within the six month limitation; and (3) show good cause for the granting thereof.

Furthermore, it is clear from the transcript of the testimony taken in the New Orleans Bankruptcy Court on June 4, 1969 concerning a hearing on petitioner's objection to allowance of the IRS's claim that the field auditor for the IRS, Marvin R. Brown, did, after learning of the conflicting bar dates, examine the records of the proceedings in the Clerk's office in the New Orleans Bankruptcy Court. An examination, even of a cursory nature, would give the IRS not only constructive but actual notice that no extension had been filed by them in the proceedings. If Mr. Brown did not observe this, or, if observing it, he did not obtain competent legal advice from the vast staff of the IRS, his actions can be deemed nothing short of gross negligence.

However, even absent actual knowledge, the IRS must be charged with constructive knowledge that no extension had been filed by them lest a government agency be allowed to trade upon its inefficiency to the detriment of conscientious and alert creditors and in derogation of a clear and mandatory law meticulously enacted.

Therefore, as the IRS did not apply for an extension and since it knew that without such application it could not be granted an extension to file its claim, the IRS could not be misled into thinking it had extra time in which to file.

Said inaction, as the product of the IRS's inefficiency and negligence, fall far short of not only fraud and injustice but unfairness as well:

> "That case (Williams v. Rice, 30 F. 2d 814 (5th Cir. 1929)) was one in which, because of exceptional circumstances of fraud on the part of the bankrupt, the estate was reopened, to administer concealed assets, and therefore

proof of claim was allowed.. No exceptional circumstances whatever is presented here. There is merely a case of negligence and inattention in the matter of preparing and filing schedules, and...an effort to invoke a jurisdiction with which, if it exists, is greatly exception." Phillips v. Tarrier Company of Delaware, 93 F. 2d 674, 675 (5th Cir., 1938). Writ denied 303 U.S. 655.

"If a creditor is negligent, he may not file his claim after the limitation of the statute has run...". Williams v. Rice, 30 F. 2d 814, 815 (5th Cir., 1929).

"Where there is no question as to the good faith, but mere negligence and inattention to the matter of preparing and filing schedules, the court is not empowered to permit the filing of claims after the six-month period...". In re Kornblum, 22 F. Supp. 245, 247 (U.S. District Court D. Minnesota 1938).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Merrill T. Landwehr
Counsel for Petitioner
225 Baronne Street, Suite 2313
New Orleans, Louisiana 70112
Telephone: 1-504-529-1332

November 30, 1973

C E R T I F I C A T E

I hereby certify that copies of the above and foregoing Petition for Writs of Certiorari have been served upon Scott P. Crampton and Meyer Rothwacks, of the United States Department of Justice, Tax Division, Washington, D.C. and the Solicitor General of the Department of Justice, Washington, D.C. 20530 by depositing one copy of the same to each of the aforesaid addresses in the United States Mail, postage prepaid, air mail.

New Orleans, Louisiana, this 30 day of March, 1973.

MERRILL T. LANDWEHR
2313, 225 Baronne Street
New Orleans, Louisiana 70112
Telephone: 529-1232

APPENDIX "A"

11 USC SECTION 93 SUB. N

"(n) Except as otherwise provided in this title, all claims provable under this title, including all claims of the United States and of any State or any subdivision thereof, shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed: Provided, however, That the court may, upon application before the expiration of such period and for cause shown, grant a reasonable fixed extension of time for the filing of claims by the United States or any State or any subdivision thereof: Provided further, That the right of infants and insane persons without guardians, without notice of the bankruptcy proceedings, may continue six months longer: And provided further, That a claim arising in favor of a person by reason of the recovery by the trustee from such person of money or property, or the avoidance by the trustee of a lien held by such person, may be filed within thirty days from the date of such recovery or avoidance, but if the recovery is by way of a proceeding in which a final judgment has been entered against such person, the claim shall not be allowed if the money is not paid or the property is not delivered to the trustee within thirty days from the date of the rendering of such final judgment, or within such further time as the court may allow. When in any case all claims which have been duly allowed have been paid in full, claims not filed within the time hereinabove prescribed may nevertheless be filed within such time as the court may fix or for cause shown extend and, if duly proved, shall be allowed against any surplus remaining in such case.

APPENDIX "B"

OPINIONS AND JUDGMENT BELOW

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3469

In The Matter Of: RAYMOND CHESTER MILLER,
Bankrupt,

MERRILL T. LANDWEHR,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

---

(September 17, 1973)

Before GOLDBERG, CLARK and RONEY,
Circuit Judges.

RONEY, Circuit Judge: The Trustee in Bankruptcy for Raymond C. Miller appeals from a decree of the District Court ordering the Referee to allow the filing of a tax claim by the United States against the Bankrupt estate. The Referee had denied the claim as being

untimely filed. The case involves the effect of a Referee's second notice of the first meeting of creditors which apparently inadvertently set a deadline for filing claims different from that established by the first notice. We affirm the decision of the District Court that the Government's claim filed prior to the second date should be allowed, but on a different ground than that asserted by the District Court. We hold that the Referee had the power to extend the time for filing a Government claim, and that, having received a notice in the apparent exercise of that power, the Government was entitled to rely thereon.

The petition for bankruptcy was originally filed on January 31, 1968, in the United States District Court for the Southern District of Florida. On March 19 of that year the Referee in Bankruptcy mailed a notice to all creditors, including the Internal Revenue Service, informing them that the first meeting of creditors would be held April 5, 1968, and that the last day for filing proofs of claim against the Bankrupt estate would be October 4, 1968. At the meeting of creditors on the designated date the Referee determined that the proceeding should be transferred to the United States District Court for the Eastern District of Louisiana for the convenience of all parties in interest, pursuant to Section 32 of the Bankruptcy Act, 11 U.S.C.A. 55. On May 6, 1968, the proceedings were transferred. Subsequently, on July 18, 1968, the Louisiana Referee in Bankruptcy mailed notices to all creditors, including the IRS, which stated that a "first meeting of creditors" was to be held on August 6, 1968, and that the final date for filing proofs of claim against the bank-

rupt estate would be February 6, 1969. On January 27, 1969, prior to this Louisiana "last day" for filing proofs of claim but after the bar date set by the Florida Referee, the IRS filed the contested proof of claim in this proceeding.

The Referee dismissed this claim as untimely, holding that the original bar date of October 4, 1968, was controlling and that the later bar date inadvertently established by his court's notice was ineffective. In reversing the Referee's determination, the District Judge held that the Florida court's notice was rendered nugatory by the transfer of the matter to Louisiana, and that the later bar date established by the Louisiana court order was controlling. The IRS was allowed to file its claim.

We first examine the continuing effect, if any, of the notice issued by the Florida court prior to the transfer of the case to Louisiana. There is a paucity of relevant authority interpreting the change of venue statute under the Bankruptcy Act. The analogy provided by decisions applying the general change of venue provision, 28 U.S.C.A. 1404(a), is helpful. In *Magnetic Engineering & Manufacturing Co. v. Dings Manufacturing Co.*, 178 F.2d 866 (2d Cir. 1950), the court reaffirmed the proposition that when an action is transferred through a change of venue, it remains what it was: "all further proceedings in it are merely referred to another tribunal, leaving untouched whatever has already been done." *Id.* at 868.

The District Court in Florida relinquished jurisdiction over the case when it transferred the matter to the Louisiana District Court. But the orders issued prior to the transfer continued as though the case were still pending in the original district.[1] The transfer for the convenience of the parties simply brought the cause as it was to the transferee jurisdiction.

Since the October 4 bar date was still in effect at the time of the transfer, the question becomes whether the Louisiana District Court could, through its exclusive jurisdiction, alter that date by a subsequent order. Section 57n of Bankruptcy Act, 11 U.S.C.A. 97 (n) provides:

> Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed: *Provided, however,* That the court may, upon application before the expiration of such period and for cause shown, grant a reasonable fixed extension of time for the filing of claims by the United States. . .

Thus, the Court can alter the original bar date by a subsequent order at least insofar as it affects the Government. Although the IRS did not apply to the Court for an extension of time, the fact remains that the Court had the power to issue an order extending the time for filing claims in respect to the Government.

---

[1] *See Ginsburg v. Mutual Life Ins. Co. of N.Y.*, 170 F. Supp. 212 (S.D.N.Y. 1958). *See also* C. Wright, Federal Courts § 44, at 166 (2d ed., 1970).

When the IRS Agent learned of the "new bar date" he believed the order was an extension granted by the Court.[2] After a discussion with his supervisor, it was agreed he should rely on this new date and conduct his examination accordingly.[3] It was because of this reliance that the tax claim was not submitted until January 27, 1969.[4] The Government did not request an

---

[2]The record of Agent Brown's testimony before Referee Flanagan reveals the following:

By Mr. Schaffer:

Q Did you take any action to confirm this date [Feb. 6]?

A Yes, I did. I went to the records here in the building.

Q The offices of the Referee?

A Correct.

Q And what did you find there?

A I found the notice issued by, I believe, Judge Flanagan himself, *extending* the bar date to February.

[3] Q Did you talk this over with any of your peers or superiors?

A Well, when I received the notice on the extension of the bar date to February the 6th of 1969, I discussed this with my group supervisor and tried to attempt (sic) whether or not this was a valid extension — should I rely — not whether it was a valid extension, but should I rely on this extension in my examination; and discussing it with him, he and I came to the agreement that I should rely on this.

[4]The record demonstrates that Agent Brown was acting post haste to meet the October 4th deadline but relaxed his efforts when he learned of the Court order:

By Mr. Schaffer:

Q When you received the file pertaining to Raymond C. Miller, may we ask what was your first effort on behalf of the Service as regards that file?

A When I received the file, I immediately tried to contact the taxpayer, . . .

. . .

Q What were you trying to do at this time with regards to the file on Raymond C. Miller? What was your primary objective?

A My primary objective was contacting the taxpayer to let him know that his income tax liability for the year '66 was in question and to get him to submit all the necessary records I needed to verify that tax liability.

. . .

Q May I ask, for the record, at what point in time, if you recall, was it that you asked for this collateral investigation [by the New York IRS office into records of the Bankrupt kept in that region]?

A It was in September.

Q What part of September?

A September — the first week of September — September the 4th, I believe. Now, I asked for this "collateral" and then I had to follow up on it.

Q It seems to me, Mr. Brown, that you were doing a good bit of work in trying to locate records and what-not to crystallize any liability of the taxpayer for the first couple of weeks that you had the files. Was there any reason for this — this speed that you showed?

A Yes, because the bar date was October the 4th of '68.

. . .

Q Is it your testimony then that even up to the first week of September you were aware of an October 4th deadline for filing claims?

A Correct.

. . .

Q Can you tell us when approximately this knowledge came to you of the new bar date?

A I would say sometime in September — early September. When exactly, I couldn't give you.

Q When you first learned of this postponement formally from the records in the Bankruptcy Court offices, what was your reaction on your handling of the Raymond C. Miller case?

A Well, at that time, I felt I can relax the speed at which I was trying to close the case out somewhat to secure as much information as I possibly could.

. . .

Q Did you have any contact with the Bankruptcy Court after you found out the bar date was set back to February?

extension since under the new date there was sufficient time to gather the necessary information to file a claim.

It is now admitted by the parties and the Referee that the order extending the bar date was an inadvertent mistake. Neither the Referee nor the Trustee detected the difference in dates until after the Government had filed its claim. Should the Government be penalized for the Court's error? The Trustee argues that it should because the IRS was dilatory in its investigation, was put on notice as to the apparent conflict in the dates, and has not attempted to collect its non-dischargeable tax claims by pursuing the Bankrupt during the five year period this bankruptcy has been pending.

The record set out in the margin above demonstrates that Agent Brown pursued the investigation with necessary speed once his office was apprised of the action. The fact that the Government was put on notice of the two dates becomes inconsequential when it is realized that the Court had the authority to extend the date and the IRS relied on the apparent exercise of this authority.

Additionally, the Trustee was put on equal notice with the Government. Since he stands in a fiduciary relationship to all the creditors and has the inherent duty

---

A No, I relied on this February 6th date. . . . [I]t led me to believe that there was additional time in which I can attempt to secure additional information which I didn't have at the present time.

to keep them informed, the Trustee should have noted and clarified the discrepancy presented by the second court order. The Trustee concedes that the Government could have probably obtained an extension of time under Section 57n had it seen the necessity for it and requested an extension. The Government's evidence indicates it could have met the October 4 deadline, if it knew it was required to do so.

The contention that the IRS has not independently attempted to collect the tax claim is of no help to the Trustee. The Government had a right to present its tax claim with the other creditors in the bankruptcy proceeding. It presented that claim relying upon a court notice which was ostensibly within the Court's authority to make.

The general equity power existing in the bankruptcy courts is well established and has been traditionally recognized. *Bank of Marin v. England*, 385 U.S. 99 (1966). Cautiously, this equity power has been employed to prevent an unfair result occasioned by the six-month period provision of Section 57n. *In re Miracle Mart, Inc.*, 396 F.2d 62, 64 (2d Cir. 1968); *In re Martin Edsel, Inc.*, 228 F.Supp. 538, 540-541 (D.C.N.H. 1968). *See Pepper v. Litton*, 308 U.S. 295, 305 n.11 (1939). An unfair result would obtain in the case at bar if the Government were not allowed to file its claim after reliance on the court order apparently extending the filing date. The District Court was correct in allowing the Government to file its claim.

The District Court found that the Government's proof of claim was "amply sufficient prima facie evidence of a valid indebtedness and must be the basis of allowance of such claim." The Government's proof of claim was filed on IRS Form 2317, the usual form submitted by the United States for internal revenue taxes in bankruptcy matters. The sufficiency of filing through use of IRS Form 2317 has been upheld. *In re Tyner*, 301 F.Supp. 1234 (M.D. Ga. 1969).

AFFIRMED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF

RAYMOND C. MILLER, a/k/a

RAYMOND CHESTER MILLER

BANKRUPT

SECTION "A"

No. 68-849

IN BANKRUPTCY

U. S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
OCT 3 1972
FILED
AT
CLERK

CHRISTENBERRY, J.

This matter is before the court on a petition by the United States of America, a creditor of the bankrupt herein, Raymond C. Miller, for review and reversal of the Referee's order dated June 21, 1971, upholding the Trustee's objections and disallowing the Government's claim. The bankrupt, Raymond C. Miller, filed his petition in bankruptcy in the United States District Court for the Southern District of Florida on January 31, 1968. Schedule A-1 of that petition did not list the United States as a creditor and there was no indication at that time that any federal taxes were due and owing from the bankrupt.

On March 19, 1968, a notice was mailed to all creditors notifying them that the first meeting of creditors would be held in Miami, Florida on April 4, 1968, and that, pursuant to Section 57(N) of the Bankruptcy Act, all proofs of claim had to be filed on or beford October 4, 1968. The first meeting of creditors was held April 4th and April [illegible]h, 1968. Soon thereafter, the Referee recommended to the United States District Court for the Southern District of Florida that proper venue for this matter lay in the Eastern District of Louisiana, and on May 6, 1968, the matter was transferred to this District.

On July 18, 1968, the Referee for this Court sent out another notice of a first meeting for August 6, 1968, and set February 1, 1969 as the last day for filing claims. It is clear that this notice was not intended by the Referee to be an extension of the

earlier bar date of October 4, 1968 set by the Florida Trustee, but was an entirely new order. Pursuant to this order setting a new bar date of February 1, 1969, the Internal Revenue Service on January 27, 1969 filed proof of claim for $280,850.79 for income taxes owing by the bankrupt for the years 1966 and 1967. Subsequently, the Internal Revenue Service was advised by the bankrupt that he was protesting the assessment against him and on April 26, 1969, filed a motion requesting the Bankruptcy Court to adjudicate his income tax liability. This motion was later withdrawn when the Internal Revenue Service agreed to re-examine the Bankrupt's liability. Internal Revenue Service, after a reexamination, found that the claim against the bankrupt should cover only the income tax liability for 1967. Accordingly, Internal Revenue Service on July 24, 1969 filed Amendment No. 1 to its proof of claim in the total amount of $90,664.82, and then on July 6, 1970, filed a second amendment alleging that the total amount due and owing was the sum of $90,492.98.

On August 27, 1970, the Trustee filed a petition for an order to show cause why the Government's claim should not be expunged or otherwise reduced, on the grounds that the Government's proof of claim was not timely filed, and alternatively, that the proof of claim was not sufficient to establish a prima facie case for allowance of the Government's claim. To this the United States filed an opposition. The Referee, by findings of fact and conclusions of law and order entered on June 21, 1971, held that the first bar date, set by the court in Florida, was controlling, and that therefore, the Government's proof of claim filed subsequent to that date was untimely. The Referee did not deal with the second issue, that is, whether the proof of claim filed by the Internal Revenue Service was sufficient to establish a prima facie case for allowance, for in his view that question was moot.

This court finds that the Referee was in error, the bar date set by the Florida Referee was not determinative of the timeliness

of proofs of claim filed in the proceeding before this court, but that on the contrary, the bar date set by the Referee of this court is the date binding upon creditors appearing in this proceeding. This is necessarily so. The notice of first meeting of creditors and notice of time limit for filing proofs of claim, etc., contained the following language, "Creditors desiring to participate in any proceedings or distribution of assets in this case must file their proofs of claim with the undersigned Referee on or before October 4, 1968." The Referee who signed the notice was Referee James E. Yacos, Referee in Bankruptcy, Miami, Florida. Once these proceedings were transferred to this district, the Florida Referee had no jurisdiction in the matter and filing claims with him after such transfer would have been vain and useless. That the Referee of this court recognized this as being true is evidenced by the fact that he issued a new notice of first meeting and set a new bar date. This is the only reasonable explanation of the Referee's action, for when the matter was transferred here from Florida on May 6, 1968, the bar date set by the Florida Referee was five months off, and ample time remained for creditors to file their claims.

Although the Referee did not pass on the sufficiency of the Government's proof of claim, I find that such proof of claim is amply sufficient prima facie evidence of a valid indebtedness and must be the basis of allowance of such claim. Accordingly, the court reverses the decision of the referee and remands the matter to the Referee for allowance of the Government's claim.

New Orleans, Louisiana, this 29th day of September, 1972.

UNITED STATES DISTRICT JUDGE

IN THE MATTER OF	NUMBER
RAYMOND C. MILLER, aka Raymond Chester Miller	68-849
BANKRUPT	IN BANKRUPTCY

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

INTRODUCTORY STATEMENT

The voluntary petition in this matter was filed in the Southern District of Florida on January 31, 1968, bears Docket Number 68-40-BK-EC of said Court, and is identified as Pleading 1. The notice to creditors fixing April 4, 1968, as the date of the first meeting of creditors also fixed the last date for the filing of claims as October 4, 1968, and June 4, 1968, as the last date for the filing of objections to the discharge of the bankrupt.

A motion to dismiss based on jurisdictional grounds and/or to transfer was filed by the Merchants National Bank of Mobile on March 29, 1968, which motion was denied without prejudice to renew said motion after the first meeting of creditors. The first meeting of creditors was held on April 4, 1968, and a continued hearing on April 5, 1968, after which Honorable James E. Yacos, Referee, recommended that the matter be transferred, under Section 32(c) of the Act, to the United States District Court in New Orleans, and directed that said transfer be forthwith set for hearing before the Honorable Emett C. Choate, United States District Judge.

A petition to amend Schedules A-2 and A-3 was filed on May 7, 1968, and on that date Referee Yacos deferred ruling upon petition for amendment of debtor's petition, pending action by the United States District Judge regarding the transfer of said proceedings.

On May 15, 1968, the Clerk of the United States District Court for the Southern District of Florida transmitted to the Clerk of this Court the entire record of the proceedings, which matter was then docketed as No. 68-849 and the order of transfer was identified as Pleading No. 1.

Certificate of mailing of the Southern District of Florida, identified as Pleading No. 6 of said Court, certifies that the mailing of the notice of first meeting of creditors and notice of time limits for filing proofs of claim and objections to discharge was also mailed to governmental agencies.

Three claims were filed in the record in Florida, being numbered 1, 2 and 3. Claims filed in the case in this district were numbered 1 through 12.

This court on July 18, 1968, mailed a notice to creditors, taxing officials, etc. fixing August 6, 1968, as the date of the first meeting of creditors. This notice also, through inadvertence, fixed a new date for the filing of claims as February 6, 1969. The last day for filing claims should have been October 4, 1968, as was fixed in the court in the Southern District of Florida. The notice also contained the following paragraph:

> "This bankruptcy proceeding was filed originally in the Southern District of Florida, United States District Court, as No. 68-40-BK."

Pursuant to notice the first meeting of creditors in this District was held in New Orleans on August 6, 1968, and a continued hearing was held on October 15, 1968.

On April 30, 1969, the bankrupt filed a petition to request hearing to determine legality of unpaid taxes, but withdrew said request on September 8, 1970.

Claim No.	Name of claimant	Date filed	Amount
1	Diner's Club, Inc.	3-26-68	$1,766.06
2	Grady Holloway	4-11-68	275.00
3	City Wide T. V. Inc.	5-06-68	100.28

New Orleans

	1a	Merchants National Bank of Mobile	7-09-68	187,000.00
	2a	H. Stern Jewelers, Inc.	7-13-68	109.00
	3a	Longview Bank & Trust Co.	8-06-68	17,500.00
	4	Texaco, Inc.	8-12-68	176.13
*	5	Parisian Cleaners	10-17-68	145.80
*	6	United States, IRS	1-27-69	280,850.79
	6a	United States, IRS	7-24-69	90,664.82
**	7	Gables Estates Club, Inc.	2-13-69	200.00
*	8	Dr. Robert A. McNaughton	5-01-69	80.00
*	9	Jordan Marsh Co.	7-07-69	819.28
*	10	Miami Herald Pub. Co.	10-14-69	23.76
*	12	Florida Power & Light Co.	4-30-71	160.91
	6b	United States, IRS	7-06-70	90,492.98
	6c	United States, IRS	9-08-70	90,492.98

* Filed too late
** Claim 7 paid at time of sale of realty in Florida, as claimant had previously filed a lien on said property.

On April 30, 1969, the trustee filed objections to claim No. 5 of Parisian Cleaners in the amount of $145.80, and to claim No. 6 of the United States in amount of $280,850.79. Hearings were held on June 4, 1969, and on September 24, 1969. Briefs were submitted by counsel for the trustee and United States. Parisian Cleaners did not make an appearance, nor file any pleadings.

On August 27, 1970, a petition was filed by trustee for the United States to show cause why its claim should not be expunged or otherwise reduced, reserving all of his rights to his objection to allowance of claim. A hearing on this petition was held on September 29, 1970, and briefs were submitted. This question is now moot in view of my findings of fact and conclusions of law.

In the interim, the funds in the possession of the trustee, originally in the amount of $83,908.31 have been invested in U. S. Treasury Bills or in certificates of deposit, depending on most advantageous rate of interest.

FINDINGS OF FACT

1) Petition in bankruptcy was filed in Miami, Florida, on January 31, 1968. Schedule A-1 of said petition did not list the United States as being due any taxes. Photocopy of bankrupt's 1966 return attached to schedules indicated no tax was due the United States.

2) On March 19, 1968, a notice was mailed to all creditors notifying them that the first meeting of creditors would be held in Miami, Florida, April 4, 1968, and that creditors must file their proof of claim on or before October 4, 1968.

3) The Florida certificate of mailing, dated March 19, 1968, shows that governmental agencies were mailed a copy of said notice of first meeting of creditors.

4) First meeting of creditors was held in Miami, Florida, on April 4th and 5th, 1968.

5) This case was transferred from Miami, Florida, to Eastern District of Louisiana, by order of Honorable Emett C. Choate, United States District Judge dated May 6, 1968.

6) On July 18, 1968, this court mailed a notice to all creditors, taxing officials, etc. notifying them that the first meeting of creditors would be held on August 6, 1968, and that creditors must file claims on or before February 6, 1969.

7) That three claims were filed in Florida and four in New Orleans on or before October 4, 1968, totalling $206,946.47.

8) Claim No. 5 of Parisian Cleaners in amount of $145.80

10) Priority Claim No. 6 of United States was amended and filed on July 24, 1969, showing income tax due for year of 1967 only in amount of $90,664.82, and showing date tax lien arose as October 15, 1968.

11) Priority Claim No. 6 of United States, amended on July 1, 1970, filed on July 6, 1970, for $90,492.98 as a secured claim, showing dates notice of tax lien filed April 7, 1969; April 8, 1969 and April 29, 1969.

12) Priority Claim No. 6 of United States for $90,492.98 was amended on September 4, 1970, filed September 8, 1970, as a priority claim and showing date tax assessed as October 15, 1968.

13) The United States received notice of first meeting of creditors which was mailed at Miami, Florida, on March 19, 1968.

14) Income tax return was not assigned to agent until August 23, 1968.

15) Other pertinent facts are included in introductory statement.

CONCLUSIONS OF LAW

Claims not timely filed

Section 57n specifically states:

> "Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed. (underlining by court).

Claim No. 5 of Parisian Cleaners in amount of $145.80 shall not be allowed. No appearance was made by this creditor as to the objection by trustee of its allowance.

Claim No. 6, and its amendments, filed by the United States as a priority claim shall not be allowed, as it was not timely filed.

The first date set for the first meeting of creditors at Miami, Florida was April 4, 1968. The first meeting was actually held on said date and continued to the next day, April 5, 1968.

Even though the governmental agencies were notified on March 19, 1968, of the first date set for the first meeting and of the last date, October 4, 1968, for the filing of claims, no representative of the government was present at that meeting.

The case was later transferred to New Orleans and on July 18, 1968, notice from this court, designating August 6, 1968, as the date set for the first meeting of creditors, and February 6, 1969, as the last date for the filing of claims. This notice was sent to all creditors and the Internal Revenue Service. No representative of the government saw fit to attend said meeting. While this notice was labeled "Notice of first meeting of creditors", the notice specifically stated:

> "This bankruptcy proceeding was filed originally in the Southern District of Florida, United States District Court, as No. 68-40 BK."

It is to be noted here that court was in error in fixing a second date for filing claims. The bar date should have remained the same as fixed by the court for the Southern District of Florida. This error was an inadvertent one and was not done to defraud nor mislead any creditor.

It is also a fact that the notice from this court was captioned, "First Meeting of Creditors," rather than informing creditors that the meeting was actually a continued one. This also was an administrative error.

Volume 3 of Collier, par. 57.27 (3) page 386 refers to the date when time limit begins to run. Prior to 1938, the time limit began to run from the date of adjudication. The 1938 act altered this so that the six months' period commences to run from "the first date set for the first meeting of creditors". At page 387 of this volume Collier says:

> "...Moreover, a first meeting called and commenced may in some cases be postponed or continued until

An early examination of the record by Internal Revenue Service would have disclosed that the first date set for the first meeting of creditors was April 4, 1968, and that the last date set for the filing of claims was October 4, 1968, and would also have informed Internal Revenue Service that the meeting on August 6, 1968, was in fact a continued first meeting of creditors, for the transcript of the hearing on August 6, 1968 states:

> "Continued hearing of first meeting of creditors after transfer to the above court from the Southern District of Florida, resumed at 10:00 o'clock a.m., on Tuesday, the 6th day of August, 1968, pursuant to the adjournment of April 4 and 5, 1968 in the Southern District of Florida."

The government, after it had knowledge of the two bar dates, did not contact the Referee as to a clarification as to which date governed, nor did it request an extension of time, prior to October 4, 1968, within which to file its claim, as provided by Section 57n of the Act.

The tax returns were not assigned to Marvin R. Brown, a field auditor for Internal Revenue Service, until August 23, 1968, forty (40) days prior to October 4, 1968, and more than five (5) months after Internal Revenue Service had received notice of first date set for first meeting of creditors.

The Internal Revenue Service did not file its claim within six months after the first date set for the first meeting of creditors, and there is no dispute as to this fact, nor can the government contend that there was knowledge on the part of the trustee, or of the Referee, that any taxes were due, which could possibly be a basis for permitting the filing of an amended claim. The schedules showed that no taxes were due, and photo copy of the 1966 return, appended to the schedules, also showed that there were no taxes due.

It was an easy matter for the Internal Revenue Service to inspect this record, which was available at all times,

It would have verified that the first date set for the first meeting was April 4, 1968, and the last date for the filing of claims was October 4, 1968. It was the duty of the government when it received notice of first meeting of creditors from this court on or about July 18, 1968, to contact the court for a ruling as to which was the correct bar date. This was not done, and the Internal Revenue Service decided to interpret the second notice as an extension of the bar date. The second notice was definitely not an extension, for the court under the law could not extend the time limit as set out in Section 57n of the Act, and the government should have known this. Instead nothing was done until August 23, 1968, when the tax returns were assigned to an agent.

Shortly after the trustee realized that two claims had not been timely filed, he initiated proceedings to disallow same on April 30, 1969. This rule against the government related to the original claim filed on January 27, 1969, for $280,850.79, covering income taxes alleged to be due for the years 1966 and 1967. At the hearing held on June 4, 1969, to disallow the claims, the government attempted to justify its failure to timely file its claim by the testimony of a Mr. Marvin R. Brown, a field auditor for the Internal Revenue Service, who testified that the returns were not assigned to him until August 23, 1968.

The court was not impressed with the reason given by the government for its failure to timely file,as evidenced by Mr. Brown's testimony. In its brief the Internal Revenue Service insinuates that they were mislead by the trustee, and that he had not come into court with "clean hands". The entire record discloses that the blame rests solely with the government, as they took no action whatsoever after receiving two notices of this bankruptcy proceeding, one from Florida and one from this court.

The Internal Revenue Service is now attempting to apply the facts of this case to the law embodied in several decisions in which the courts held equitable principles should govern.

There is absolutely no fraud involved in this case, and no injustice is being done to Internal Revenue Service by the disallowance by this court of its claim. The claimant was not diligent and slept on its rights. An assessment of the tax claimed to be due for 1967 was not made until October 15, 1968, eleven days after October 4, 1968, the second bar date. The returns were not referred to a field auditor until August 23, 1968, more than five (5) months after it had received notice from Florida, and more than one month after it had received the notice from this court. The government had ample time to apply to the court for an extension under the proviso of Section 57n of the Act. It did not do this, but elected to go on the assumption that an extension had been granted.

In its brief the government states it was misled by the order setting a new time limit for the filing of claims, and that the Revenue Officer, Mr. Brown, who testified at the hearing, was originally aware of the first time limit for filing of claims, but "learned indirectly of the later date for filing". The brief does not explain the reason why Internal Revenue Service took no action prior to August 23, 1968, the date the income tax returns were turned over to Mr. Brown; why it had not attended any of the meetings of creditors, having had sufficient notice, nor why under all of the circumstances of the case it had not applied for an extension, as heretofore set out.

The United States is relying on the case of Pepper vs. Litton, 308 U. S. 295, and other cases cited in its brief.

The language used in Pepper vs. Litton, supra, which has prompted certain courts to extend the statutory limits of Section 57n of the Act, is:

> ". . .and even though the Act provides that claims shall not be proved against a bankrupt estate subsequent to six months after the adjudication, the bankruptcy court in the exercise of its equitable jurisdiction has power to permit claims to be proved thereafter in order to prevent a fraud or an injustice".

In all of the cases cited, the courts have decided upon a factual situation, such as would not adversely affect anyone by the tardy allowance of a claim. The facts in this case do not justify the application of equitable principles, for the reasons: first, that the United States was grossly negligent in not timely processing its claim, and, second, it would seriously affect the trustee who represents creditors who had timely filed their claims for $206,946.47.

The facts in Walsh vs. Lockhart Associates, 339 F.2d.417 (5CCA1964) and Fausett vs Murner, 402 F.2d.961 (5CCA1968) are distinguishable from the facts in this case. No such knowledge of an existing claim can be attributed to the trustee or the court, as previously stated in this opinion, i.e. the schedules did not reflect any taxes due the United States, nor did the 1966 return, attached to schedules. The facts will further show that no taxes were ultimately due for 1966, and the assessment for income tax 1967 was not made until October 15, 1968.

Section 57n should be strictly construed. See Collier on Bankruptcy, Volume 3, par 57.27, at page 376:

> "Whether the court may extend the statutory period for filing proofs of claims is a slightly more complex question. The inherent equity powers of the bankruptcy court, so frequently referred to, are a tempting instrument to mitigate the harshness involved in any statutory time limitation, but under the present Act courts have generally withstood the temptation even in situations in which the equities of the case, if they might have been considered, spoke strongly in favor of equitable relief."

And in the same volume, at page 379, it is stated:

> "The weight of authority considers the statutory six months' period as mandatory and immutable. This is a statute of limitations."

The United States also cites the April, 1969, issue of the Journal of the National Conference of Referees in Bankruptcy, at page 54. This court relies heavily on this article and agrees whole-heartedly with the conclusion reached by the author of said article, Asa S. Herzog, one of our most prominent and learned referees. The article was cited to show the leniency of the Fifth Circuit, in granting amendments. It must be borne in mind that the claim, as originally filed was not an amendment. The claim was filed as being timely. However, Referee Herzog does not agree with the Fifth Circuit. His conclusion at page 58 is:

> "Despite those cases which reason that the time bar of Sec. 57n may be extended through the bankruptcy court's equitable power, it would seem that at least since the 1938 amendments, the power does not exist. The many amendments to Sec. 57n in 1938 were added with full congressional awareness of the divergent judicial views. They manifest a determination to resolve the conflict, and therefore constitute a direct reinforcement of the reasoning in favor of strict enforcement of the statutory time limitation. It is submitted that the prevailing view and, in my opinion, the sounder view, is that the bankruptcy court is under a duty to disallow a claim untimely filed and has no power to substitute equitable consideration for the manifest intent of Congress."

The second argument in the brief of the United States is:

> "This court may consider the new time limit as an extension under Section 57n".

In its argument, the United States is relying on another surmise on its part when it states, "The government respectfully submits further that this court may have been considering

There is absolutely no basis for this assumption. Another bar date was inadvertently set, and the notice did not specify it was an extension. The United States erroneously construed it as such, even though, with proper diligence, it could have availed itself of the provisions of Section 57n and applied for an extension, particularly in view of the circumstances of this case. The United States should have known that the bar date is six months after the first date set for the first meeting of creditors.

In conclusion, it is the considered opinion of the court that the claim of the United States was not timely filed. There are no facts to justify the application of equitable principles in this case, even if this court did have the equitable power to do so. To the contrary, to allow the claim of the United States would impose an injustice on the creditors who timely filed their claims.

"EQUITY AIDS THE VIGILANT, NOT THOSE WHO SLUMBER ON THEIR RIGHTS."

Accordingly, an order will be entered disallowing Claim No. 5 of Parisian Cleaners, and Claim No. 6 of the United States, as amended.

Merrill T. Landwehr
Raymond C. Miller
Burton G. Klein
Honorable Gerald S. Gallinghouse